No. 82-2140

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILBUR HOBBY, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

and

SUGGESTION TO DEFER CONSIDERATION OF PETITION

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TABLE OF CASES AND OTHER AUTHORITIES

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The Government does "not oppose granting of the petition limited to the third question presented". Brief for the United States, p. 18. The

Government acknowledges that the third question -- whether the courts below erred in condoning the systematic exclusion of Blacks from appointment as foremen of federal grand juries--" is the subject of a relatively entrenched conflict among the circuits that would, all other things being equal, warrant review by this Court". Brief for the United States, p. 15. However, the Government's remark (Brief, p. 17 n. 10) that "this case is not necessarily an ideal vehicle" for resolving this conceded conflict, merits this reply.

1. The Government is in error in its assertion that the petition for a writ of certiorari "was filed", or "appears to have been filed", one day out of time. Brief for the United States, pp. 1, 18 at n. 10. The Government apparently is unaware of the

circumstances of the filing, which was accomplished in timely fashion in accordance with Rule 33.7.

The due date for filing the petition was June 28, 1983, the 60th day after entry of the judgment of the Fourth Circuit. On that day, petitioner submitted to the Clerk of this Court 40 copies of the petition. But the Clerk refused to accept the copies for filing because the paper exceeded the size prescribed by Rule 33.1(d). The Clerk immediately returned the documents to petitioner, indicating the rule violation and suggesting that the documents be refiled in proper form as promptly as possible. Petitioner did in fact refile 40 copies of the petition in proper form the following day, June 29.

Rule 33.7 provides that when the Clerk refuses to accept a document as

not in compliance with this Rule, such as the page-size requirement of Rule 33.1(d), "the filing, however, shall not thereby be deemed untimely provided new and proper copies are promptly substituted". It also appears to be the practice of the Clerk's Office, in Rule 33.7 situations, to stamp and record as the filing date of the petition the date of the substituted filing (in this case, June 29), rather than the date of the attempt to file in improper form (in this case, June 28).

Thus the petition must be deemed timely filed, pursuant to Rule 33.7. Indeed, that has long been the practice in this Court where a timely filing is rejected by the Clerk because of non-compliance with a Rule respecting the form of the document. See R. Stern and E. Gressman, Supreme Court Practice

452 (5th ed. 1978), commenting on the provision in predecessor Rule 39(4) that is identical with the timeliness provision of present Rule 33.7.

2. The Government further suggests this case is not an "ideal vehicle" for resolving the conceeded conflict because of a possible "standing" problem. Brief for the United States, pp. 1 at n. 4, 17 at n. 10. But there is no standing problem.

This is a federal criminal case. Petitioner is a white male. Levi, his co-defendant and alleged co-conspirator, is a black male. As this Court noted in Peters v. Kiff, 407 U.S. 493 at 501, n. 9:

> "The principle of the representative jury was first articulated by this Court as a requirement of equal protection, in cases vindicating the right of a Negro defendant to challenge the

systematic exclusion of Negroes from his grand and petit juries. E.g., Smith v. Texas, 311 U.S. 128, 130 (1940). Subsequently, in the exercise of its supervisory power over federal courts, this Court extended the principle, to permit any defendant to challenge the arbitrary exclusion from jury service of his own or any other class. E.g., Glasser v. United States, 315 U.S. 60, 83-87 (1942); Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946); Ballard v. United States, 329 U.S. 186 (1946). Finally it emerged as an aspect of the constitutional right to jury trial in William v. Florida, 399 U.S. 78, 100 (1970)" (emphasis supplied).

3. Petitioner suggests that this Court defer action on the Petition for Certiorari pending consideration of the petitions in Cross and Aimone.

The Government anticipates "filing a petition for a writ of certiorari in United States v. Cross" (wherein the Court of Appeals for the Eleventh Circuit expressly disagreed with the decision below), and notes that

"petitions are presently pending in Nos. 83-681 to review the Third Circuit's decision in Aimone" (wherein the Third Circuit expressly agreed with the decision below). Brief for the United States, p. 18, at n. 10. The Government therefore suggests that "the Court may prefer to reach this issue in a case presenting no time problem". Brief for the United States, p. 18, at n. 10. The implication is that the Court should deny certiorari here, and later review the issue on the Government's petition in Cross, and on the pending petitions in Aimone.

To this suggestion Petitioner makes two answers. First, as demonstrated above Petitioner has no "time problem". Second, it makes no sense to deny certiorari here (with the consequence that petitioner Hobby go to jail for 18

months) and decide the issue on a truncated record. Petitioner suggests that the records in his case, like the records in the Cross and Aimone cases, will enhance the knowledge available for consideration, provide additional insights, and thereby assist the Court in its decision processes.

4. Petitioner disclosed a serious conflict in the circuits concerning the amount of preliminary proof necessary to trigger discovery and a hearing on the issue of selective prosecution. Petition, pp. 25-32.

In this case, the lower courts were in agreement with the standard of the Eighth Circuit, that the defendant must establish a prima facie case to warrant a hearing on the issue of selective prosecution. Petition, p. 29. Similarly, the Fifth and Sixth Circuits

view the defense with "extreme skepticism", on a "separation of powers" theory which precludes judicial interference "with the free exercise of the discretionary powers" of the district attorney absent a strong showing of "bad faith" and "impermissible considerations". Petition, pp. 27-28.

In contrast, the First Circuit has expressly rejected the prima facie test and requires only that the defendant allege facts "tending to show" that there has been selective prosecution. In accord are the triggering requirements of the Second Circuit (a "colorable basis"), the Third Circuit (a "colorable entitlement"), and the District of Columbia Circuit ("colorable claim".) Petition, pp. 26-31. The Seventh Circuit, en banc, with one

concurrence and four dissents, similarly requires only that the defendant "raise a reasonable doubt about the prosecutor's purpose". Petition, p. 29.

The Government dismisses the difference in the circuits as a "semantic variation". Brief for the United States, pp. 8-9. Petitioner submits that it is a matter of substance which requires this Court's direction and guidance.

Respectfully submitted

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November 23, 1983

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 1983, three copies of the Reply Brief for Petitioner and Suggestion To Defer Consideration of Petition in Hobby v. United States, No. 82-2140, were mailed postage prepaid to the Solicitor General of the United States at the Department of Justice, Washington, D. C. 20530.

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